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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of )

Promotion of Competitive Networks )  
in Local Telecommunications Markets )

WT Docket No. 99-217

Wireless Communications Association )  
International, Inc. Petition for )  
Rulemaking to Amend Section 1.4000 of )  
the Commission's Rules to Preempt )  
Restrictions on Subscriber Premises )  
Reception or Transmission Antennas )  
Designed to Provide Fixed Wireless )  
Services )

Implementation of the Local Competition )  
Provisions in the Telecommunications )  
Act of 1996 )

CC Docket No. 96-98

Review of Sections 68.104, and 68.213 )  
of the Commission's Rules Concerning )  
Connection of Simple Inside Wiring to )  
the Telephone Network )

To The Commission )

PETITION FOR RECONSIDERATION  
OF FLORIDA POWER & LIGHT COMPANY

FLORIDA POWER & LIGHT COMPANY

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February 8, 2001

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**PETITION FOR RECONSIDERATION  
OF FLORIDA POWER & LIGHT COMPANY**

Pursuant to 47 C.F.R. § 1.429, Rules and Regulations of the Federal Communications Commission ("Commission"), Florida Power & Light Company ("FPL") respectfully submits the following Petition for Reconsideration of the Commission's rulings on access to

rights-of-way in commercial multi-tenant environments ("MTES") in the *First Report and Order* in the above-captioned proceeding.<sup>1</sup>

#### I. STATEMENT OF INTEREST

Florida Power & Light Company is an investor owned electric utility which is engaged in the generation, transmission, distribution and sale of electric energy. As part of its electric distribution system, FPL owns a large number of poles, ducts, and conduits and is the holder of numerous easements. Wireline communications facilities are attached to some of the FPL poles and easements. FPL is regulated by the Florida Public Service Commission ("FPSC"). The FPSC regulation includes that of electric utility capacity, safety, and reliability.<sup>2</sup> The Florida legislature has adopted the National Electrical Safety Code ("NESC") as the initial standard of the Florida electric utilities and has determined that the FPSC is the administrative authority referred to in the NESC.<sup>3</sup> The FPSC does not regulate

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<sup>1</sup>*In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC No. 00-366 (rel. Oct. 25, 2000) (hereinafter referred to as the "MTE Order").*

<sup>2</sup>Sections 366.01; 366.04(2)(b); 366.04(5); 366.04(6); 366.05(1); 366.05(7); 366.05(8), Florida Statutes (2000).

<sup>3</sup>Chapter 366, Florida Statutes (2000), § 366.04(6). See also *FPL's Reply Brief* filed in *Southern Company v. Federal Communications Commission*, Case No. 99-15160-GG (Consolidated Cases) (pending before the United States Court of Appeals for the Eleventh Circuit), a copy of which is attached as Appendix "A" to

### III. ARGUMENT

1. **The Commission Incorrectly Concludes That It Has No Remedy Under Section 251(c) and, Therefore, Improperly Expands Its Jurisdiction Under Section 224.**

The Commission should reconsider its rejection of Section 251(c) remedies and reverse its rulemaking as to Section 224. Access to MTEs should be addressed, if at all, through Sections 251(a)(1), (b)(4), (c)(3) and (c)(6), not Section 224. That the incumbent LECs are the source of access problems in MTEs is clear from the Commission's statements and those of the commentators<sup>4</sup>. In the *Notice of Proposed Rulemaking* and in its *MTE Order*, after reviewing the extensive comments filed in this matter, the Commission recognizes that the access grievances presented to it involve the building owners and the incumbent local exchange carriers, not the electric utility:

"In several proceedings before the Commission, a number of parties have argued that both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises."

(*NPRM* at ¶ 31.)

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<sup>4</sup> See *FPL Reply*, filed September 27, 1999 at pages 10 through 13 and footnote 26. See also *AT&T Comments to Further NPRM*, filed January 22, 2001, at page 7 referring to the massive record in this rulemaking and stating "[m]any of these submissions catalogue the formidable barriers to open competition in the MTE environment that result from abuses of market power by building owners and incumbent LECs" and citing to several such comments. (Emphasis added.)

In Section 251(a)(1), Congress places an express duty on the telecommunications carrier to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." In Section 251(b)(4) Congress expressly requires the incumbent LEC to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." In Section 251(c)(3), Congress requires the incumbent LECs to provide access on an unbundled basis to network elements. In Section 251(c)(6), Congress orders the incumbent LECs "to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ."

The Commission has determined that a telecommunication "right-of-way" is a network element--at least in terms of building access:

"We interpret the term "rights-of-way" in the context of buildings to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility's transportation and distribution network." (MTE Order at ¶ 76). (Emphasis added.)

"We also conclude that "rights-of-way" in buildings means, at a minimum, defined pathways that are being used or have

been specifically identified for use as part of a utility's transmission and distribution network." (MTE Order at ¶ 82.)

(Emphasis added.)

The duties the incumbent LECs under Section 251 provide several bases for addressing the specific problem before the Commission--that of obtaining access to the ducts, conduits or pathways of the incumbent LECs in buildings. The "ducts" and "conduits" can be identified as telecommunications "network elements" without resort to "right-of-way" definitions. Collocate means just that, "to place," to set side-by-side.<sup>5</sup> The Commission does not need to bootstrap or torture the definition of "rights-of-way" to mean an "easement equivalent" (MTE Order at ¶ 83) or anywhere that a utility places a facility used in the distribution of its system or such area as been designated for such use, but particularly in MTEs. (MTE Order at ¶ 82.)<sup>6</sup> Nor does the Commission need to extend meaning of right-of-way beyond the longtime industry practice and understanding of the term "right-of-way" as used in Section 224 as meaning real property, not inside buildings.

Unlike Section 224 practices and intent, Section 251(c)(6) anticipates shared use within buildings. In Section 251(c)(6),

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<sup>5</sup> Webster's Third New International Dictionary, Unabridged, (1986).

<sup>6</sup> See FPL Comments and Reply Comments as to the meaning of "rights-of-way" as used in Section 224.

Congress not only orders the incumbent LECs to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements, it refers to the "premises" of the local exchange carrier. One of the definitions of premises is "lands and tenements," "[a] distinct and definite locality, and may mean a room, shop, building, or other definite area, or a distinct portion of real estate."<sup>7</sup> The term premises is more flexible and includes the area used on or in rooftops, building walls, floors or ceilings or spaces rented, or licensed thereon by the communications company.

Even if the Commission provides some reasoned explanation for its rejection of the remedies under Sections 251(a)(1), (c)(3) and (c)(6), it should still look to Section 251(b)(4)--a Section ignored by the Commission. Congress created an independent and express duty in Section 251(b)(4) on the incumbent LEC to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services.<sup>8</sup> Moreover, in Section 251(d)(1), Congress expressly required the Commission to implement the provisions of Section 251, including Section 251(b)(4)--something Congress did not do with respect to the nondiscriminatory access provisions of Section 224(f).<sup>9</sup> Statutes authorizing access of a

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<sup>7</sup> *Black's Law Dictionary*, Fifth Edition.

<sup>8</sup> Section 251(b)(4) provides a clear right of mandatory access consistent with the essential facilities doctrine as applied in anti-trust cases to the same industry, while Section 224(f) provides for nondiscriminatory access.

private person to the property of another private person must be narrowly construed. To avoid overreaching and unnecessary and ineffective rulemaking, the Commission's MTE access rules should be implemented, if at all, under Sections 251(b)(4) or 251(c) so as to apply only to the incumbent LECs.

**2. The Commission Exceeded Its Delegated Authority By Expanding Its Pole Attachment Jurisdiction Under Section 224 To Private Rooftops and Riser Conduits Within Private Buildings.**

Neither the Pole Attachments Act nor the record supports the Commission's further expansion of its pole attachment regulation under Section 224 to private rooftops and riser conduits within private buildings. A "takings" right must be expressly granted by the sovereign. Such power cannot be bootstrapped or created by merely requiring payment of "just compensation." Moreover, where as here, Congress did not delegate the right to the Commission, but (if the Commission is correct in its interpretation of Section 224(f))<sup>10</sup> to private entities, the

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<sup>9</sup> Congress, here as in Section 224, maintains the distinction between the Commission's jurisdiction over the right of access and its jurisdiction to regulate the rates, terms and conditions of such accessed or attached entity under Section 224. See *FPL Reply Brief*, at pages 17-23, attached to the *FPL Comments* filed January 22, 2001, in the *Further Notice of Proposed Rulemaking*.

<sup>10</sup> The Eleventh Circuit in *Gulf Power Company v. United States*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999) found that Section 224(f) created a right of mandatory access for the benefited cable television and telecommunications companies. The plaintiffs in that case affirmatively argued the Commission's interpretation of Section 224(f) to require mandatory access in order to reach the facial compensation issue and did not argue that Section 224(f) requires only that access once granted must be nondiscriminatory, including as to that utility's own telecommunications subsidiaries or affiliates.

right of mandatory access cannot be found under provisions of general regulatory jurisdiction. Where those access rights are exercised by private entities against public utilities, including the electric utility which is of superior necessity, those powers are particularly limited. See *United States v. Carmack*, 329 U.S. 230, n. 13 (1946), *pet. rehrg. denied*, 329 U.S. 834 (1947):

[Statutory language authorizing] officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself . . . is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. (Emphasis added.)

The record in this proceeding, as well as the Commission's own determinations, show that the electric utilities as well as the water, gas and steam utilities which are subject to the Section 224(f) burdens are not the cause of access problems to MTEs and are not the solution. The record is that the electric

utilities do not have "rights-of-way" within MTE buildings; that electric utilities do not have "rooftop" installations; that the electric utility facilities typically stop at the meter (generally located outside the building); and that in the relatively infrequent instances where an electric utility may have riser conduits within or attached to a MTE building, such conduits cannot accommodate communications attachments. See *FPL Reply Comments* at pages 10-13; *American Electric Power Service Corporation Reply Comments* at pages 13-14; *Joint Comments of UTC and EEI* at page 4 and n. 4. The Commission has no jurisdiction under Section 224 where pole attachments are regulated by the state.<sup>11</sup> There are no such limitations under Section 251. Nothing in Section 224 remotely suggests that Congress intended the Commission to place a mandatory access requirement on the private MTE property owners, directly or indirectly.

**3. The Commission's "Right-of-Way" Rules, Fail to Advance Commission Goals.**

The main goal of the Commission is quick deployment of the competing telecommunications facilities in the MTEs. Expansion of the Commission's jurisdiction by bootstrapping the term "right-of-way" as used in Section 224 to address the problem with

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<sup>11</sup> 47 U.S.C. § 224(c)(1). Argument is pending before the United States Court of Appeals for the Eleventh Circuit that the Commission has no rulemaking or enforcement jurisdiction over access under Section 224(f) as to the electric utilities, even under a mandatory access requirement. *Southern Company v. FCC*, Case. No. 99-15160-GG (Consolidated Cases).

landowners and the incumbents in the MTEs fails to advance this goal. The Commission correctly determined that the states must interpret the extent to which a utility owns or controls a right-of-way. (*MTE Order* at ¶ 87.) The Commission, for purposes of its jurisdiction under Section 224, also found that utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so.<sup>12</sup> This necessary result, in order to avoid the takings issue with respect to the private MTE landowner, renders the Commission's Section 224 rulemaking for access the MTEs a practical nullity. As thoroughly discussed in the comments,<sup>13</sup> a utility has no ownership or control over a right-of-way for purposes of allowing third party access if it has merely a license, permit or tariff right alone to install facilities on a customer's premises because it has no interest in the land itself. A license cannot be enlarged beyond its original purpose.<sup>14</sup> Courts also are interpreting easement rights more narrowly.<sup>15</sup>

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<sup>12</sup> *MTE Order* at ¶ 89.

<sup>13</sup> See, e.g., *Real Access Alliance Comments*, Part II, "Survey of Use and Access Rights to Real Property."

<sup>14</sup> See generally, Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*, revised edition (1995 and supplements), at ¶ 1.03[2] and Chapter 11, ¶¶ 11.01 through 11.07. Because the utility has no interest in the land, however, the landowner may grant others licenses over the same premises (area of use). The only restriction would be that additional use by a third party not interfere with the prior right of use,

Another reason why the Commission's Section 224 rules in MTEs are a practical nullity and do not further Commission's goals is that court determination of rights under a written easement or lease agreement or even whether a "license" is really an easement or vice-versa is likely, at the very minimum, to take two years, excluding appeals. Such cases would involve at least three parties: the landowner who would seek additional compensation -- whether or not entitled to it; the utility; and the competitive communications company. It would also involve substantial attorneys' fees. Moreover, even assuming such a right is found, the Commission would have to determine the compensation due to the utility case-by-case, consuming vast time and resources of the Commission. Such result is diametrically opposed to the Congressional mandate, often repeated by the Commission, that attachment rates be determined in an expeditious manner which would necessitate a minimum of staff, paper and procedures.<sup>16</sup>

The Commission's access rules under Section 224 are also unnecessary. Where there is merely a license in the premises, as appears from the record to be the more typical case, the

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particularly where facilities have been installed. Thus, there is no forced access and no takings issue with respect to the landowner.

<sup>15</sup> See, e.g., *McDonald v. Mississippi Power Company*, 732 So.2d 893 (Miss. 1999).

<sup>16</sup> See *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, FCC 97-94, Case Docket No. 97-98, Released March 14, 1997, ¶ 4, citing 1977 Senate Report at 21.

landowner may grant others licenses over the same premises (defined area). The only restriction would be that additional use by a third party not interfere with the prior right of use, particularly where facilities have been installed.<sup>17</sup> The access issue to MTEs ultimately finds its way back to the MTE landowner. That this poses a conundrum for the Commission does not and cannot justify the usurpation of the term "right-of-way" from Section 224 for purposes of creating rooftop access to MTEs for a particular telecommunications technology in order to avoid the consent of, or additional payment to, the MTE landowner. Section 224 does not support extension of the Commission's delegated rulemaking, rate making, or complaint resolution authority into the MTE private property, either directly or indirectly.

While some of these issues might also exist under the Section 251 remedies, the Commission's authority is not nearly as circumscribed there as under Section 224. Nor is the Commission

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<sup>17</sup> *Id.* See generally, Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*, revised edition (1995 and supplements), at ¶ 1.03[2] and Chapter 11, ¶¶ 11.01 through 11.07. See also, *Id.* at ¶ 11.01 (contrasting license with lease conveying exclusive possession of the premises). An easement typically does not exclude non-interfering use by the landowner. In the case of public utilities, however, it typically excludes use by the landowner for the provision of such utility services, unless clearly provided otherwise. Some states provide that the holder of an easement created by express grant has a right to full use of the easement area, not just that reasonably required, which would preclude the landowner from granting additional easements involving structures within that easement area to third parties. See, e.g., *Diefenderfer v. Forest Park Springs*, 599 So.2d 1309 (Fla. App. 1992), pet. for review denied, 613 So.2d 4 (Fla. 1992). See also *Lamb v. Wyoming Game and Fish Commission*, 985 P.2d 433 (Wy. 1999) and cases cited therein.

under Section 251 limited to those states which have chosen not to regulate pole attachments. A Section 251 remedy also directly addresses at least one-half of the identified cause of the problem, the incumbent LECs. The other half, the MTE owners, have agreed to work with the Commission in addressing this issue.<sup>18</sup> The Commission has stated that it will closely monitor the progress and will consider taking additional action if the efforts of the MTE owners fail.<sup>19</sup> This is yet another reason as to why the Commission should reconsider its rulemaking under Section 224 and MTE rooftops and inside conduits access. Moreover, until the courts have addressed issues now pending before the courts, such as whether the Commission's pole attachment jurisdiction extends to the wireless facilities of the wireless carriers or whether the Commission has jurisdiction to adopt and enforce access rules under Section 224(f), the Commission should not proceed with the access to MTE's rulemaking under Section 224.

#### IV. CONCLUSION

For the reasons set forth herein and such other reasons as may appear just to the Commission, the Commission should reconsider its access to MTE rulings under Section 224 and revoke

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<sup>18</sup> MTE Order at ¶ 8.

<sup>19</sup> MTE Order at ¶ 9.

the same. To avoid overreaching and unnecessary and ineffective rulemaking, the Commission's MTE access rules should be adopted under Section 251, including Section 251(b)(4) or 251(c)(6).

Respectfully submitted,

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February 8, 2001

CERTIFICATE OF SERVICE

I, Jean G. Howard, hereby certify that on this 7th day of February, 2001, copies of the foregoing Petition for Reconsideration of Florida Power & Light Company were delivered by overnight mail to:

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